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# Supreme Court of the United States

October Term, 1977

No. 77-426

IN RE: WILLIAM T. WULIGER  
*Petitioner*

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**PETITION FOR WRIT OF CERTIORARI**  
**To the Supreme Court of Ohio**

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Supreme Court of the United States

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October Term, 1977

No. .....

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IN RE: WILLIAM T. WULIGER

*Petitioner*

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**PETITION FOR WRIT OF CERTIORARI**

To the Supreme Court of Ohio

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**OPINIONS DELIVERED BELOW**

Petitioner was convicted for contempt in the Court of Common Pleas, Cuyahoga County, Ohio; the conviction was journalized in the attached journal entries (Appendix pp. A1-A3). The matter was appealed to the Court of Appeals, Eighth Judicial District, State of Ohio, which delivered its unreported opinion (Appendix pp. A5-A13). The matter was then appealed to the Supreme Court of the State of Ohio which granted jurisdiction and then after argument ruled that no final appealable order was present (See Appendix pp. A15-A16). During the pendency of these appeals the matter was also heard in disciplinary proceedings by the Greater Cleveland Bar Association (See Record R. 134).

### BASIS FOR INVOKING OF JURISDICTION

This cause is before this court having been decided by the Eighth District Court of Appeals of Ohio and jurisdiction having been refused by the Supreme Court of the State of Ohio. The decisions of these courts are violative of the protections of the Fifth and Fourteenth Amendments to the United States Constitution in that they violate the guarantees of the protection against double jeopardy and due process of law and that they are not in accord with applicable decisions of this court.

The instant petitioner was summarily convicted of three charges of alleged contempt on October 1, 1974, October 11, 1974 and October 25, 1974. On December 2, 1974 he was sentenced to five days for the first charge, ten days for the second charge and fifteen days for the third charge; all to run consecutively. The conviction was appealed to the Eighth District Court of Appeals of Ohio and on May 7, 1976 it was decided that the trial court's journal entries failed to state a finding of fact which supported the conviction, found that the trial court was personally involved and prejudiced at the time of sentencing and found insufficient facts to justify the conviction in the transcript. It ordered the case remanded for a new finding of fact by the original trial court and then transferred to a second court for sentencing (Appendix pp. A12-A13). A motion for reconsideration was filed by petitioner and was overruled on May 28, 1976. The matter was then appealed to the Supreme Court of Ohio which granted leave to certify the record on October 8, 1976. On April 13, 1977 the Supreme Court of Ohio, after hearing, dismissed the case, sua sponte, for want of a final appealable order. A motion for a rehearing was overruled on May 6, 1977.

### QUESTIONS PRESENTED FOR REVIEW

- I. Does a Violation of the Fifth and Fourteenth Amendments of the United States Constitution Occur When a Trial Court Whose Record Fails to Contain a Sufficient Factual Basis to Support a Finding of Summary Contempt Is Allowed on Remand to Create a Factual Basis to Support a Conviction?
- II. Does a Violation of the Guarantee of Due Process of Law of the Fourteenth Amendment to the United States Constitution Occur When a Trial Court That Has Been Determined to Be Incapable of an Impartial and Unbiased Attitude Toward Petitioner Is Allowed to Make a Redetermination of the Evidentiary Basis for a Finding of Direct Contempt?

### CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be . . . twice put in jeopardy of life or limb.

United States Constitution, Amendment XIV:

. . . (Nor) shall any State deprive any person of life, liberty, or property, without due process of law.

## STATUTORY PROVISIONS

**Ohio Revised Code, Section 2705.01**

### *Summary Punishment for Contempt*

A court, or judge at chambers, may summarily punish a person guilty of misbehaviors in the presence of or so near the court or judge as to obstruct the administration of justice.

## STATEMENT OF CASE

Petitioner, a licensed attorney of the State of Ohio, was appointed to represent Charles Jordan in Cuyahoga County Court of Common Pleas Case No. CR. 14174. During the trial of this case, a trial which lasted many weeks, petitioner was summarily found in contempt on three occasions (App. pp. A1-A3), then was sentenced to a total of thirty (30) days in jail (App. p. A4).

The basis for the contempt convictions was apparently petitioner's conduct in the questioning of witnesses. At the time of the first contempt citation, the court referred to a conference and admonitions on the previous day (T. 2604-2605, R. 57, 58). However, in examination of that record, there is no evidence of either a specific order or instruction (T. 2315-2344, R. 17-46). On the other two occasions the court referred to an admonition which it claimed was given the petitioner, but which does not exist in this record (T. 4330-4331, R. 63-66 and T. 6373-6385, R. 69-82). The basis for the contempt and the specific questions on at least two of the alleged contempts is not clear in the record and the issue throughout is how the questions complained of disturbed the court's business or violated a specific court order.

Beginning early in the trial and continuing throughout its course, a personal antagonism between the court and the petitioner is apparent in the record (See Record 1-25, 61-62, 83-92). Subsequent to the adjudication for contempt, the trial court filed a complaint with the Grievance Committee of the Greater Cleveland Bar Association and made a concerted effort to pursue the complaint (R. 134).

At the time of his sentencing, petitioner was not given prior written notice of the contempt charges. Also, although found in contempt during the trial, sentencing was deferred until after the end of the trial in CR. 14174. On November 7, 1974, shortly before the end of that trial, Petitioner filed a Motion for a Hearing Before a Disinterested Judge, Personal Bond Pending Outcome of Proceedings, Written Specification of the Charges and Jury Trial. Despite the motion, at no time did the trial court set forth what order, if any, it felt had been violated, nor at any time did it set forth what conduct or statements by Petitioner it felt had been contemptuous. Also, despite the fact that the court had made many comments which indicated its bias against Appellant, the court refused to assign another judge to Appellant's case.

On November 15, 1974, three of the defendants in CR. 14174, including Charles Jordan, were found guilty on a number of counts and not guilty on a number of other counts. The jury could reach no decision on the remaining counts against these defendants. The fourth defendant was found not guilty on all counts. Further proceedings in the matter of Petitioner's contempt were scheduled for November 18, 1974, but on that date, without any hearing, the proceedings were continued until November 20, 1974. On November 20, some discussion was held on the record between the trial court, co-counsel for Petitioner, and Petitioner, but that discussion was limited to (1) the reason

for the prior continuance, and (2) the motion filed on November 7, 1974 (See transcript of contempt proceedings of November 20 and December 2, Contempt Transcript, 3-26, R. 95-118). The proceedings were again continued until Petitioner finished representing a defendant in a trial which was then in progress. On December 2, 1974, the final proceedings were had in the matter of Petitioner's contempt (Contempt Transcript, 27-39, R. 119-131). The trial court denied the motion filed on November 7, 1974, said that Petitioner had already been found in contempt, and also said that the only question to be addressed at the proceeding was sentencing (Contempt Transcript, 17 and 31, R. 109, 123). The trial court then sentenced Petitioner to 5 days in jail for the contempt of October 1, ten days in jail for the contempt of October 11, and fifteen days in jail for the contempt of October 25, all sentences to be served consecutively (App. p. A4).

Immediately after he had been sentenced, Petitioner filed in the Court of Common Pleas a Notice of Appeal and a Motion for Personal Bond and an Order to Stay Execution of Sentence Pending Appeal. The motion was denied by the trial court. In fact, the trial court refused to stay execution of sentence or set any bond for the appeal (Transcript, 38 and 39, R. 130-131). Neither at sentencing nor at any time since has the trial court issued written findings setting forth the order allegedly violated or the question allegedly asked by Petitioner which constituted the contempt in the mind of the court.

After the trial court had denied Petitioner's motion for an appeal bond, Petitioner filed in the Court of Appeals a Motion for Personal Bond and an Order to Stay Execution of Sentence Pending Appeal. On December 2, 1974, the Court of Appeals granted said motion and Petitioner was released from jail upon signing a \$1,000 personal bond.

On December 12, 1974, in spite of the fact that the trial court had not given Petitioner notice of what questions caused him to be cited for contempt and in spite of the fact that the trial court had indicated that the relevant portions of the transcript could not be prepared quickly enough to be used for Petitioner's contempt proceedings (Contempt Transcript, 31, R. 123), the trial court submitted to the Grievance Committee of the Bar Association of Greater Cleveland a letter of complaint against Petitioner for his alleged conduct in and surrounding the trial of Charles Jordan. Attached to his letter of complaint were excerpts from the transcript of the trial of Charles Jordan, showing among other things, that the Petitioner had been found in contempt three times but not showing the questions leading to the first and third findings of contempt.

Subsequently the Subcommittee of the Bar Association indicated in preliminary reports that not only did it not find misconduct in the conduct which is the basis for this contempt but further raised an additional opinion that the conduct was not contemptuous (R. 197-209). When the trial court learned of this preliminary finding, members of the committee were contacted by the court and were requested to review their findings (R. 199).

Subsequently the Bar Association dismissed all but one of the allegations of misconduct. That allegation was regarding alleged misconduct after the sentencing of the appellant and was unrelated to the conduct which was allegedly the basis for the contempt.

This appeal was perfected after the proceedings in the Cuyahoga County Court of Appeals and the Supreme Court of Ohio.

During the course of argument before the Court of Appeals, the Appellate Court questioned counsel for re-

spondent regarding the Appellate Court's difficulty in finding a definitive order which it was alleged that the petitioner had violated and which gave rise to the contempt. In order to supply the court with that order, counsel for respondent was given leave to file a Supplemental Brief containing that information. When the Supplemental Brief was filed the non-existence of such an order remained apparent.

A motion for reconsideration was filed on May 17, 1976 with the Court of Appeals. That motion raised the issues that a remand to allow a new journal entry was a violation of the guarantees against double jeopardy and due process. The same issue was raised on appeal to the Supreme Court of Ohio in the Memorandum Supporting Jurisdiction and the Brief filed with that court.

### ARGUMENT

#### **I. WHEN A TRIAL COURT FAILS TO PROVIDE A SUFFICIENT FACTUAL BASIS TO SUPPORT A CONVICTION FOR SUMMARY CONTEMPT, THE COURT IS PROHIBITED BY THE GUARANTEES OF DUE PROCESS OF LAW AND THE PROHIBITION AGAINST DOUBLE JEOPARDY FROM CREATING A NEW FACTUAL BASIS TO SUPPORT THE CONVICTIONS.**

This question presents to this Court the question of the proper appellate remedy when a trial court fails both in its journal entry and in the trial record itself to provide a factual basis to support a finding of summary contempt. The journal entries filed by the trial court contain only the conclusion that the petitioner was found in contempt (See Appendix pp. A1-A3). The trial court failed to state the

basis for the contempt at the time of its citation of petitioner during trial (T. 2605, 4331, 6385, R. 58, 68, 81). Finally the trial court refused to provide petitioner with a factual notice of the basis for the contempt at the time of adjudication.

In its opinion the Eighth District Court of Appeals held that the failure of the trial court to provide a factual basis for the three contempt citations was reversible error (Court of Appeals Opinion, App. pp. A5-A13). The Court of Appeals also addressed itself to the question of whether the cited conduct was itself contemptuous. It concluded that the petitioner asked improper questions, but went on to say that the asking of improper questions was itself insufficient to rise to the level of contempt. Finally the court's opinion noted "the standard of conduct (was) too vague and the improper questions too innocuous to justify criminal contempt proceedings." (*id.* at A12). The Court of Appeals then remanded the case to the trial court to allow that court to create a factual basis to justify its findings of summary contempt.

The petitioner claims that the remand by the Eighth District of Ohio Court of Appeals was erroneous and in violation of petitioner's constitutional guarantees of due process and prohibitions against double jeopardy.

This Court has in *Michaelson v. United States*, 266 U.S. 42, 45 S. Ct. 18 (1924) ruled that prosecution for criminal contempt is synonymous with any other criminal proceeding. As the Court said,

In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond a reasonable doubt and the defendant may not be compelled to be a witness against himself. The fundamental characteristics of both are the same.

Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure." *Id.* at 66, 67, 45 S. Ct. at 20. (Citations omitted.)

In previous criminal cases, where this court has been faced with a general finding of guilty without a specified basis for that verdict, and where the conviction may be based on illegal grounds, this Court has ruled that it is not proper to remand the case for a *post hoc* explanation for the grounds of a judicial decision. *Street v. New York*, 394 U.S. 576, 587, 89 S. Ct. 1354, 1363 (1964). In the line of cases cited in *Street*, *supra*, the Court's reasoning has consistently held that where a general verdict does not specify the ground upon which it rested and one or more of the possible bases for the conviction is invalid, it is impossible to determine that the conviction was valid and the conviction, therefore, can not be upheld. See *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931); and *Williams v. North Carolina*, 317 U.S. 287, 63 S. Ct. 207 (1942)

Similarly, in a contempt case the alleged contempt occurred at a meeting in which there was an alleged violation of a court's restraining order by means of soliciting a single individual to join a union and by soliciting all non-union men present, *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315 (1945) the court refused to consider the contention of the state that the judgment of contempt could be sustained by the individual solicitation alone. The Court stated:

The motion for the fiat in contempt was filed and the fiat itself was issued on account of both invitations.

The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order, without distinction between the solicitations set forth in the petition and proved as violations. The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's recital, and that the penalty was imposed on account of both invitations. The judgment therefore must be affirmed as to both or as to neither. Cf. *Williams v. North Carolina*, 317 U.S. 287, 292, 63 S. Ct. 207, 210, 87 L.Ed. 279, 143 A.L.R. 1273; *Stromberg v. California*, 283 U.S. 359, 368, 51 S. Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484. 323 U.S., at 528-529, 65 S. Ct., at 322. (Footnotes omitted.)

After the Court concluded that a conviction based on the general solicitation could not stand, the entire conviction was reversed. Further, as noted in *Street v. New York*, *supra*, at 587, 89 S. Ct. at 1363, *Thomas, supra*, was not remanded for resentencing but the conviction itself was reversed.

The secondary question in this analysis is whether the conviction was constitutional. However, that question does not arise in this case because the lower court found that despite its reading of the record, the facts which it found were insufficient to rise to the level of contempt.

Thus, this Court has held where a general verdict supports a conviction and the court can not determine the legality of that conviction because of the generality of the verdict then the conviction can not be upheld. Similarly, in other jurisdictions when a trial court has failed to assure the existence of a factual basis to support a contempt conviction, the conviction is reversed and a final entry of discharge is entered in behalf of the defendant. See *People*

*v. Miller*, 51 Ill. 2d 76, 281 N.E.2d 292 (1972); *Robinson v. State*, 19 Md. App. 20, 308 A.2d 712 (1973); *Ex Parte David W. Brown*, 530 S.W.2d 228 (Missouri Supreme Court, 1975); *Ward v. State*, 513 P.2d 350 (Okla. Ct. of Crim. App., 1973); *United States v. Schrinisher*, 493 F.2d 842 (5th Cir., 1974).

Petitioner, therefore, states that the due process guarantees as stated in *Street v. New York*, *supra*, and *Thomas v. Collins*, *supra*, prohibit the remand of the instant case, in which it is clear that not only is there no factual basis for the conviction in the journal entries of conviction, but further, there is no basis in fact in the transcript of the trial itself.

Finally, Petitioner argues that remand to allow the trial court to construct a factual basis in support of its previous findings is tantamount to placing the appellant in jeopardy of a second conviction in violation of the protections of the double jeopardy clause of the Fifth Amendment of the United States Constitution. The protection of the double jeopardy clause as explained by Mr. Justice Black in *Green v. United States*, 355 U.S. 184 (1957) is

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty. *Id.* at 187-188.

The risk of multiple prosecution occurs when the state puts forth its proof and fails to convict and then makes a second attempt for the same conviction. The right to

be free from the "risk of hazard" of multiple prosecutions and the threat of multiple punishments has been deemed to be included in the concept of "essential fairness" requisite for every trial and has, thus, been made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

In the instant proceedings, the trial court proceeded to convict the petitioner for direct contempt. It has been the position of the Petitioner throughout that the conduct complained of did not rise to the level of direct or summary contempt. The trial court failed to respond to this issue and failed to provide any basis for its conviction in its journal entry. The Court of Appeals found insufficient evidence in the instant record to support the trial court's conviction. To remand the case for a new finding of fact by the trial court is essentially allowing the trial court to "try again" to locate evidence in the record to support its determination of guilt. The petitioner argues such a proceeding falls squarely within the definition of double jeopardy.

The petitioner, therefore, contends that the Court of Appeals erred when it remanded the instant case for an additional finding of fact. The petitioner contends that upon the findings and conclusions stated in its opinion, the proper remedy pursuant to due process guarantees and the prohibition against double jeopardy was to reverse the trial court's decision and enter a final entry of dismissal, discharging the petitioner.

**II. WHEN A TRIAL COURT IS DETERMINED TO HAVE BECOME INCAPABLE OF AN IMPARTIAL AND UNBIASED ATTITUDE TOWARDS A PETITIONER, THE GUARANTEES OF DUE PROCESS OF LAW OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THAT COURT FROM CREATING A FACTUAL BASIS TO SUPPORT A FINDING OF DIRECT CONTEMPT.**

Due process of law requires that a trial judge "hold the balance" nice, clear and true between the state and the accused. *Tumey v. Ohio*, 273 U.S. 510 (1927). In determining this standard of conduct, the inquiry must be not only whether there was actual bias on the part of the trial court but also whether "there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite*, 376 U.S. 575 (1964). In its order and opinion of May 7, 1976, this Court of Appeals found, in its response to petitioner's Assignments of Error III and IV that the trial judge was not so embroiled in the controversy with the appellant at the time of the findings of contempt to require him to excuse himself. However, the court did find, at the time of sentencing, that the trial judge was incapable of impartial and unbiased sentencing, and required the court to remove himself from the question of sentencing on remand. In support of its finding, the Court's opinion referred to certain portions of the transcript in its footnote. The petitioner concurs with the court's findings regarding the attitude of the trial court at the time of sentencing. The petitioner, however, argues that this attitude existed at the time of the original contempt citations. Three of the four examples relied upon by the Court of

Appeals in its footnote, are the exchanges which occurred prior to, or at the time of, the initial finding of contempt (T. 1667, 2334, 2606, R. 12, 36, 59). Further, after the findings of contempt the trial court vigorously prosecuted its complaints before the Bar Association of Greater Cleveland.

However, even accepting the Court of Appeals' findings on this issue, the appellant argues that it would now be improper to permit the trial judge to prepare a journal entry which justifies the finding of contempt, to select what he considers the relevant portions of transcript and then leave the question of sentencing to another court. If the trial judge was biased and partial toward the defendant at the time of sentencing, there is no evidence to indicate that that condition does not remain at the present time.

The United States Supreme Court in *In re Murchison*, 349 U.S. 133 (1955) dealt with the issue of a judge who was both the accuser and the trier of fact. Mr. Justice Black stated at page 136:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S.

510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14.

In applying *Taylor v. Hayes*, 418 U.S. 488 (1974) the Court must look to the question of whether the trial court has become embroiled in a running controversy with counsel so as to result in bias, a likelihood of bias or appearance of bias. In applying this test to the question of the trial court at the time of sentencing, the Court of Appeals has responded affirmatively. Yet, at the same time, the opinion returned to the same trial court's judicial discretion the question of whether the appellant's conduct was contemptuous, and, if in its discretion it finds that it was, the opinion calls upon this same trial court judiciously to justify that finding either by transcript portions or journal entry. Upon completion of that task, the trial court, under the opinion, once again loses its freedom from bias and impartiality and must return the case to another court for sentencing.

The petitioner contends that holding such a procedure is improper. The petitioner contends that, if remand was proper, the proper procedure, if the trial court is desirous of proceeding would be to transfer the guilt determinative function to the sentencing judge. Such a procedure would assure the appellant a determination by an independent trial court, after a full hearing, as to whether the complained of conduct is contempt in an atmosphere of "calm detachment necessary for fair adjudication." *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

### CONCLUSION

Petitioner respectfully requests that this petition be granted. Petitioner further requests this Honorable Court to vacate the order of the Eighth District Court of Appeals of Ohio and order that court to order the petitioner discharged from further prosecution. The petitioner alternatively requests this Court to order the matter remanded to an independent trial court for redetermination.

Respectfully submitted,

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**APPENDIX**

**JUDGMENT ENTRY OF THE COURT OF  
COMMON PLEAS**

(Filed October 1, 1974)

No. CR-14174

**IN THE COURT OF COMMON PLEAS**

STATE OF OHIO, )  
                      )  
                      ) ss.  
CUYAHOGA COUNTY )

STATE OF OHIO,

*Plaintiff,*

vs.

CHARLES JORDAN, et al.,  
*Defendant.*

INDICTMENT Aggr. Burglary w/cts

**JOURNAL ENTRY**

Attorney William T. Wuliger, found to be in Contempt  
of Court.

/s/ JOSEPH J. NAHRA  
*Judge*

A2

**JOURNAL ENTRY OF THE COURT  
OF COMMON PLEAS**

(Filed October 11, 1974)

No. CR-14174

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, )  
                  )  
                  ) ss.  
CUYAHOGA COUNTY )

STATE OF OHIO,  
*Plaintiff,*

vs.

CHARLES JORDAN,  
*Defendant.*

INDICTMENT Aggr. Burglary w/cts

**JOURNAL ENTRY**

Attorney, William T. Wuliger, found to be in Contempt  
of Court.

/s/ JOSEPH J. NAHRA  
*Judge*

A3

**JOURNAL ENTRY OF THE COURT  
OF COMMON PLEAS**

(Filed October 25, 1974)

No. CR 14174A

IN THE COURT OF COMMON PLEAS

TITLE: Aggravated Burglary w/cts

STATE OF OHIO

vs.

CHARLES JORDAN *et al.*

Atty William T. Wuliger found to be in contempt.

/s/ JOSEPH J. NAHRA  
*Judge*

**JOURNAL ENTRY OF THE COURT  
OF COMMON PLEAS**

(Filed December 2, 1974)

No. CR-14174

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,      )  
                        ) ss.  
CUYAHOGA COUNTY    )

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STATE OF OHIO,  
*Plaintiff,*

vs.

CHARLES JORDAN,  
*Defendant.*

---

INDICTMENT Aggr. Burglary w/cts

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**JOURNAL ENTRY**

WILLIAM T. WULIGER, sentenced to five (5) days in Cuyahoga County Jail on contempt of October 1, 1974, ten (10) days on contempt of October 11, 1974 and fifteen (15) days on contempt of October 25, 1974, sentence as to each charge to be served consecutively.

/s/ JOSEPH J. NAHRA  
*Judge*

**OPINION OF THE COURT OF APPEALS**

(Dated May 7, 1976)

No. 34240

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA

---

IN RE: WILLIAM T. WULIGER  
*Defendant-Appellant*

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APPEAL FROM COMMON PLEAS COURT

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**JOURNAL ENTRY**

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Defendant-appellant William T. Wuliger (defendant) is an attorney at law. The lawsuit giving rise to the cause before this court was a criminal trial in which he represented one of several co-defendants. In the course of the trial, Counsel Wuliger was found guilty of three direct contempts in three separate summary proceedings. A post-trial hearing on sentencing resulted in a total penalty of

thirty days in jail for Mr. Wuliger (Tr. Vol. 2, p. 40). He appealed assigning six errors:

- "I) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT WITHOUT ISSUING WRITTEN FINDINGS SETTING FORTH THE ORDER WHICH APPELLANT ALLEGEDLY VIOLATED AND THE QUESTIONS ALLEGEDLY ASKED BY APPELLANT WHICH CAUSED THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT."
- "II) IT WAS ERROR FOR THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT WITHOUT FIRST GIVING HIM WRITTEN NOTICE OF THE CHARGES AND AN OPPORTUNITY TO BE HEARD.
- "III) IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO REMOVE ITSELF FROM PRESIDING OVER APPELLANT'S CASE.
- "IV) IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A JURY TRIAL.
- "V) IT WAS ERROR FOR THE TRIAL COURT TO HOLD APPELLANT IN CONTEMPT, BECAUSE HE WAS NOT IN CONTEMPT.
- "VI) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT TO THIRTY DAYS IN JAIL."

To assist clarity the facts relevant to each assignment of error are detailed under the respective assignments.

For reasons assessed below we reverse and remand for further proceedings according to law.

- "I) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT WITHOUT ISSUING WRITTEN FINDINGS SETTING FORTH THE ORDER WHICH APPELLANT ALLEGEDLY VIOLATED AND THE QUESTIONS ALLEGEDLY ASKED BY APPELLANT WHICH CAUSED THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT."

Upon any adjudication of contempt the trial court must, in order to afford the appellate court a basis for review, enter a written order specifically and completely setting forth the facts upon which the finding is based, *State v. Treon* (1963), 91 Ohio L. Abs. 229, 241-242, 188 N.E. 2d 308, 316; *White v. Kiraly, et al.* (Ct. App. 8th Dist., 1975, Case No. 34085, p. 2). The failure of the trial court, in the instant case, to enter such factual basis for each of the three contempt convictions constitutes reversible error.

Assignment of Error No. I is well taken.

- "II) IT WAS ERROR FOR THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT WITHOUT FIRST GIVING HIM WRITTEN NOTICE OF THE CHARGES AND AN OPPORTUNITY TO BE HEARD."

Due process requires notice of the charges and hearing on the merits when one or more of the elements of the contempt charged was not personally observed by the judge, *In Re Oliver* (1948), 333 U.S. 257, 275-276, 92 L.Ed. 682, 695; *Cooke v. United States* (1925), 267 U.S. 517, 69 L.Ed. 767.<sup>1</sup> However, assuming findings of contempt were

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1. See also Ohio Revised Code §2705.03 which provides that in cases of indirect contempt the defendant has a right to be notified, in writing, of the charges against him prior to any hearing on the merits.

proper at all in this case, summary contempt proceedings were properly invoked because all of the defendant's conduct cited as contemptuous occurred in open court and was observed personally by the trial judge, see *In Re Oliver, supra*; *Ciraolo v. Madigan* (9th Cir., 1971), 443 F. 2d 314, 319.<sup>2</sup>

Notice and hearing were not required because the adjudication immediately followed each citation for direct contempt, only sentencing was postponed until after trial, cf. *Taylor v. Hayes* (1974), 418 U.S. 488, 497-498, 41 L.Ed. 2d 897, 906-907; *Codispoti v. Pennsylvania* (1974), 418 U.S. 506, 515, 41 L.Ed. 2d 912, 921.<sup>3</sup>

Assignment of Error No. II is not well taken.

- "III) IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO REMOVE ITSELF FROM PRESIDING OVER APPELLANT'S CASE."
- "VI) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT TO THIRTY DAYS IN JAIL."

Although Assignments of Error III and VI raise different issues, there is but one factual pattern relevant to

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2. On their facts, *Cirolo* and *Oliver* are clearly distinguishable from the present case. In those cases the trial courts' findings of summary contempt were violative of due process because those findings were based on inferences supported, in part, by facts not directly and personally observed by the court. Here, the first contempt was apparently based upon an inference of "knowledge" (Tr. 2605) but all the facts in support of the inference were observed by the court. The second and third contempts were based solely on questions asked by defendant in open court and were not based on any inferences.

3. In *Taylor* and *Codispoti* the Supreme Court held due process was violated, i.e., as notice and hearing, when both adjudication and sentencing were postponed until after trial, *Taylor v. Hayes* (1974), 418 U.S. 498, 41 L.Ed. 2d at 907; *Codispoti v. Pennsylvania* (1974), 418 U.S. at 515, 41 L.Ed. 2d at 921.

both issues. Therefore, we consider the assignments together.

The trial judge was competent to summarily adjudicate the contempt citations because he had not become so embroiled in controversy with defendant as to result in bias, the likelihood of bias, or the appearance of bias, see *Taylor v. Hayes* (1974), 418 U.S. 488, 501-502, 41 L.Ed. 2d 897, 909. Moreover, immediate adjudication in cases of direct contempt is necessary to preserve the authority of the court, *In Re Oliver* (1948), 333 U.S. 257, 275-276, 92 L.Ed. 682, 695. Therefore, there was no error in the trial judge's decision to adjudicate the charges of contempt if indeed there were direct contempts.

However, the trial judge committed reversible error when he passed sentence at the conclusion of the trial. By that time it was clear, from the character of his responses to defendant's conduct, *Taylor v. Hayes* (1974), 418 U.S. 488, 503 fn. 10, 41 L.Ed. 2d 897, 910 fn. 10, that the court was incapable of impartial and unbiased sentencing.<sup>4</sup> The trial judge should have removed himself from the case for purposes of sentencing.

Assignment of Error No. III is well taken.

Because it was error for the trial judge to enter any sentence, it was error to sentence defendant to thirty days in jail. We need not reach the question of whether the

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4. Several examples, by no means exhaustive, of the court's attitude towards defendant indicate sufficient bias to render the court's sentencing improper: "You have a way of twisting the truth that defies anybody's sense of fairness . . ." (Tr. 1667); "Your sense of propriety leaves a great deal to be desired, Mr. Wuliger" (Tr. 2334); "You have a trial to complete, Mr. Wuliger, and I expect you to do it despite everything that you have done to try to cause a mistrial in this case . . ." (Tr. 2606); "It is always nice to get the truth after Mr. Wuliger has spoken . . ." (Tr. 7647).

thirty-day sentence was disproportionate. That question is for another court at another time.

Assignment of Error No. VI is well taken.

**"IV) IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A JURY TRIAL."**

Due process did not require that defendant be afforded a jury trial because the total penalties involved in the instant case were less than six months, see *Baldwin v. New York* (1970), 399 U.S. 66, 73-74, 26 L.Ed. 2d 437, 443.

There was no violation of defendant's right to Equal Protection of the laws. The legislative distinction, affording jury trials in some misdemeanor cases but not in instances of direct contempt, is rationally related to the State's interest in maintaining the court's authority by permitting summary contempt procedures in cases of direct contempt committed in open court, see *Ex Parte Terry* (1888), 128 U.S. 289, 302-303, 32 L.Ed. 405, 408; *In Re Oliver* (1948), 333 U.S. 257, 275, 92 L.Ed. 2d 682, 695; *Taylor v. Hayes* (1974), 418 U.S. 488, 497, 41 L.Ed. 2d 897, 907.<sup>5</sup>

Assignment of Error No. IV is without merit.

**"V) IT WAS ERROR FOR THE TRIAL COURT TO HOLD APPELLANT IN CONTEMPT, BECAUSE HE WAS NOT IN CONTEMPT."**

Due process in contempt cases requires notice and the opportunity to be heard except in a narrow category of direct contempts which includes:

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5. Even if any of defendant's fundamental rights were infringed, such distinction may be properly based on a "compelling state interest" to maintain the authority of the court, see *Roe v. Wade* (1973), 410 U.S. 113, 155, 35 L.Ed. 2d 147, 178.

"... only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In Re Oliver* (1948), 333 U.S. 257, 275, 92 L.Ed. 682, 695.

In this case it is clear that all the conduct in issue took place in the presence of the judge and was actually observed by him. Whether it disturbed the court's business sufficiently<sup>6</sup> to require summary action we cannot know at this juncture because the trial court's reasoning in support of the contempt finding is not available.<sup>7</sup> That same omission prevents an evaluation of the question whether the alleged misconduct involved violations of orders specific enough to constitute contempt. The record shows that improper questions were asked by the present defendant. But it is hardly conceivable that improper questions alone constitute extreme conduct which would justify a finding of criminal contempt. Therefore, improper questions could not be deemed contemptuous absent a court command defining the proscribed improprieties. And this must be done with sufficient precision to guide counsel and enable him to conform his conduct to the court's direction.<sup>8</sup> With-

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6. We leave open the question whether the immediate finding of contempt, without immediate sentencing, was punishment. If so, the requisite to such judicial retribution, is a conclusion that the punishment was necessary to prevent "demoralization of the court's authority" before the public". *In Re Oliver*, *id.*

7. See *State v. Treon*, *supra*; *Ohio v. Milano* (8th App. Dist., 1976, Case No. 34459).

8. See the second paragraph, footnote 49, of *In Re Brown* (D.C. Cir., 1971), 454 F.2d 999, 1008: "It seems worth noting, too, that 'before one may be punished for contempt for violating

(Continued on following page)

out this specificity the standard of conduct is too vague and the improper questions too innocuous to justify criminal contempt by summary proceedings.

We cannot determine Assignment of Error No. V in the absence of the factual basis for the trial court's action. The delineation of facts on remand may provide the basis for later consideration, under the guidance of those principles, should the case be appealed again.

On remand, if the trial court elects to go forward with this contempt proceeding, Judge Joseph Nahra is instructed to have produced, at the court's own expense, so much of the transcript of trial proceedings as is sufficient to demonstrate the claimed contempt. Judge Nahra is further instructed to prepare a journal entry which shall state the charges and findings of contempt made against appellant and cause same, together with the above-mentioned transcript of proceedings, to be filed with the Cuyahoga County, Ohio, Clerk of Courts. The journal entry shall contain a complete and clear statement of the factual basis for the claimed contempt and same shall be served upon the appellant. Should the court decide to pursue the alleged contempt, the administrative judge of Common Pleas Court is directed to assign a judge other than Judge Nahra to conduct the remainder of the contempt proceedings in the

*Footnote continued—*

a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed.' *McFarland v. United States*, 295 F. 648, 650 (7th Cir. 1923). See *NLRB v. Deena Artware, Inc.*, 261 F.2d 503, 510 (6th Cir. 1958) (order 'not sufficiently definite') and citations therein. . . ."

The prosecutor has failed to draw our attention to the specific orders violated either in his brief or supplemental brief filed after argument. The latter does demonstrate persistent questioning in the face of admonition. Query, whether this procedure reaches the requisite specificity of an order sufficient to justify a contempt finding for violation.

trial court, which judge, after giving appellant an opportunity to be heard, shall proceed with sentencing.

Reversed and remanded for proceedings in accordance with this entry.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings according to law.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JACK G. DAY  
*Presiding Judge*

DAY, P.J., PARRINO, J., SILBERT, J., Concur  
(Silbert, J., retired, sitting by assignment)

**JOURNAL ENTRY OF THE COURT OF APPEALS**

(Dated May 28, 1976)

No. 34240

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA**IN RE: WILLIAM T. WULIGER***Appellant***JOURNAL ENTRY**

Motion by appellant for reconsideration overruled.  
Exc.

/s/ JACK G. DAY  
*Presiding Judge*

DAY, P.J., PARRINO, J., SILBERT, J., Concur

(Silbert, Retired Judge of the 8th App. Dist., sitting by assignment.)

**ORDER OF THE SUPREME COURT OF OHIO  
DISMISSING APPEAL**

(Dated April 13, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO  
THE STATE OF OHIO, )  
CITY OF COLUMBUS. )**IN RE WILLIAM T. WULIGER.****APPEAL FROM THE COURT OF APPEALS  
FOR CUYAHOGA COUNTY**

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the appeal is dismissed, *sua sponte*, for want of a final appealable order, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

**ORDER OF THE SUPREME COURT OF OHIO  
DISMISSING APPEAL**

(Dated April 13, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, )  
CITY OF COLUMBUS. )

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IN RE WILLIAM T. WULIGER.

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**MANDATE**

To the Honorable Common Pleas Court

Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, for want of a final appealable order.

**ORDER OF THE SUPREME COURT OF OHIO  
DENYING REHEARING**

(Dated May 6, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO, )  
CITY OF COLUMBUS. )

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IN RE WILLIAM T. WULIGER.

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**REHEARING**

It is ordered by the court that rehearing in this case is denied.